Supreme Court, U.S.
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No. 96-721

In the Supreme Court of the United States

OCTOBER TERM, 1996

JOHN DOE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the appeal of a district court's ruling on a motion for reduction of sentence pursuant to Fed. R. Crim. P. 35(b) is governed by 28 U.S.C. 1291 or by 18 U.S.C. 3742.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is reported at 93 F.3d 67.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 1996. The petition for a writ of certiorari was filed on November 6, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering a guilty plea in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiracy to possess

cocaine with intent to distribute it, in violation of 21 U.S.C. 846. He was sentenced to 16 years' imprisonment, to be followed by a life term of supervised release, and fined $500,000. On the government's motion to reduce petitioner's sentence pursuant to Fed. R. Crim. P. 35(b), petitioner was resentenced to 11 years' imprisonment, to be followed by a life term of supervised release, and fined $500,000. The court of appeals dismissed petitioner's appeal of his sentence for lack of jurisdiction. Pet. App. A1-A4.

1. Petitioner was a high-ranking lieutenant in the New York cell of an international drug trafficking organization based in Cali, Colombia, that distributed cocaine in New York, Miami, Houston, Los Angeles, and Chicago. The cell had more than 18 members, including petitioner, who was the brother-in-law of the leader of the organization's New York operations. Petitioner operated under the direction of one of his co-defendants but also directed the activities of various subordinate members of the cell. Petitioner supervised the distribution of cocaine to the organization's Dominican customers, the collection of money from those customers, and the transportation of the money to the organization's various "stash" locations. As a supervisor, petitioner was aware of the cell's money laundering activities. Pet. 2-3; Gov't C.A. Br. 3-4.

2. On June 24, 1992, petitioner pleaded guilty to conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846. Under a plea agreement pursuant to Fed. R. Crim. P. 11(e)(1)(C), the government stipulated that petitioner should

receive a sentence of 16 years' imprisonment.[1] On November 6, 1992, the district court accepted petitioner's plea agreement and sentenced petitioner to 16 years' imprisonment, to be followed by a life term of supervised release, and a fine of $500,000. Pet. App. A2; Gov't C.A. Br. 4-5.

After his guilty plea, petitioner and three co-defendants began to cooperate with the government. On October 18, 1993, the government filed a motion to reduce petitioner's sentence under Fed. R. Crim. P. 35(b), and the district court agreed to hold the motion in abeyance until petitioner's cooperation was complete.[2] On April 15, 1994, the government supplemented its motion and outlined the assistance provided by petitioner. The government informed the court that petitioner had personally agreed to cooperate in a separate case against another significant

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[1] Based upon the 1,500 kilograms of cocaine attributable to petitioner and his role in the drug trafficking organization, the presentence report determined that petitioner's Sentencing Guidelines range was 360 months' to life imprisonment. Gov't C.A. Br. 4-5.

[2] In pertinent part, Federal Rule of Criminal Procedure 35(b) provides:

> (b) Reduction of Sentence for Changed Circumstances. The court, on motion of the Government made within one year after the imposition of the sentence, may reduce a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code. * * * The court's authority to reduce a sentence under this subsection includes the authority to reduce such sentence to a level below that established by statute as a minimum sentence.

cocaine trafficker, who had pleaded guilty in part because of petitioner's willingness to testify against him. It also informed the court that petitioner had arranged the cooperation of a third-party intermediary. That individual had provided information that in one case had led to the conviction of a defendant who had been arrested in possession of 21 kilograms of cocaine and in another case had led to the arrest and conviction of three defendants who were caught with 90 kilograms of cocaine. Gov't C.A. Br. 5-6.

Over the next 20 months, the government periodically advised the district court about the cooperation provided by petitioner and his third-party intermediary. At a status conference on December 2, 1994, the court generally advised petitioner and the three co-defendants that it did not give as much weight to cooperation by a third-party intermediary as it did to direct cooperation by a defendant. The court also asked the government to submit an assessment of the value of the cooperation provided by petitioner and the three co-defendants. On March 9, 1995, the government advised the court that the cooperation of petitioner's third-party intermediary had produced results of substantial benefit to the government. At a status conference on March 31, 1995, the court directed the government to provide more detailed information concerning the cooperation by petitioner's third-party intermediary. Gov't C.A. Br. 6-10. On January 9, 1996, the government reported that investigations based on the third-party intermediary's information had resulted in the seizure of more than 100 kilograms of cocaine, the seizure of more than $1 million in drug proceeds, guns, and cars, and the convictions of approximately 40 individuals. The government also advised the court that petitioner had

personally agreed to cooperate in a second case against a money launderer, who had pleaded guilty after being informed that petitioner was willing to testify against her. Gov't C.A. Br. 11-12.

Meanwhile, on December 8, 1995, the district court resentenced co-defendant Richard Roe pursuant to the government's motion to reduce his sentence under Rule 35(b). At Roe's first sentencing, the presentence report determined under the Sentencing Guidelines that his sentencing range was 360 months' to life imprisonment, and he was sentenced to 27 years' imprisonment. Because of a retroactive change in the guidelines that took effect after Roe's sentencing, the district court determined at Roe's resentencing that Roe's sentencing range should have been calculated as 235-293 months' imprisonment. After noting that Roe's cooperation consisted primarily of direct cooperation, the court resentenced Roe to 15 years' imprisonment. Gov't C.A. Br. 11.

3. On January 19, 1996, the district court resentenced petitioner pursuant to the government's motion to reduce his sentence under Rule 35(b). Because of the retroactive change in the Sentencing Guidelines that took effect after petitioner's sentencing, the district court determined that petitioner's correct sentencing range was 235-293 months' imprisonment. After noting that petitioner's original 16-year (192-month) sentence was below the minimum guideline range sentence, the court stated that "the question is whether there should be a further departure in light of both the direct and third party assistance that's been provided to the Government." Gov't C.A. Br. 12; C.A. App. 76.

The district court continued to express "reservations" about the value of third-party cooperation, but

it stated that it was "prepared to consider some further reduction in [petitioner's] sentence." Gov't C.A. Br. 13; C.A. App. 76. Petitioner's counsel emphasized to the court that petitioner had also provided direct first-party cooperation in two separate cases. Gov't C.A. Br. 13; C.A. App. 77-78. The court concluded:

> All right. Mr. [Doe], I take seriously everything that the parties have said about the fact that you've done everything you could in this case. Now, I think you've been in court on other occasions when I've expressed some concerns about whether what somebody else does should be credited to the defendant, but I am going to give you some credit for it. I don't view it as the same as what one does oneself, but in your case you also did render some personal cooperation. And I think I can fairly call the totality of your efforts substantial, so that I can reduce your sentence.
>
> You do understand that you were sentenced severely because you were involved in a very destructive criminal organization. And you played a significant role in that organization. I accept the fact that you may have gotten led into all of this through your family ties. For a while, that profited you, and I'm sure that all of you who were involved welcomed the ability to live a comfortable life as a result of your conduct. But that conduct destroyed various families and people.

Gov't C.A. Br. 13; C.A. App. 81-82. With respect to his drug trafficking activity, petitioner told the court: "I had never wanted to do that, and I had never liked

doing it, because I don't like that kind of activity." Gov't C.A. Br. 13-14; C.A. App. 83. The court responded:

> Mr. [Doe], the one thing I urge you to do is not kid yourself. Whether you liked it or didn't like it at the start, you ran the New York operation here. Now, you did it under the leadership of other people more significant than yourself, but you didn't just run an errand on one occasion for these people. You were involved day in, day out, at a top level of a major drug organization. That's why you were sentenced severely.

Gov't C.A. Br. 14; C.A. App. 83. The court acknowledged that the cooperation by petitioner's third-party intermediary had "resulted in significant forfeitures, seizures, and arrests." Gov't C.A. Br. 14; C.A. App. 84. The court again expressed its strong displeasure with the government's use of such third parties, but it concluded: "But I don't hold that against [petitioner]. He did what he could do, and I seek to give him the benefit of that." Gov't C.A. Br. 14; C.A. App. 84. The court resentenced petitioner to 11 years' imprisonment. Gov't C.A. Br. 14; C.A. App. 84-85.

4. The court of appeals dismissed petitioner's appeal for lack of jurisdiction. Pet. App. A1-A4. It observed that petitioner's appeal from the district court's reduction of his sentence under Rule 35(b) "raise[d] a question of first impression in this circuit—whether an appeal from a 35(b) motion is governed by 18 U.S.C. § 3742 (which confers limited appellate jurisdiction over appeals of otherwise final sentences) or by 28 U.S.C. § 1291 (which grants broad appellate jurisdiction over appeals of final decisions of district courts)." Pet. App. A2. The court held that

"§ 3742 applies," but it noted that "other circuits have split on this issue." *Id.* at A2-A3. The court explained that its "finding that § 3742 applies * * * is predicated * * * on the similarity between Rule 35(b) and § 5K1.1 of the Sentencing Guidelines." *Id.* at A3. The court observed that Section 3742 governs an appeal from a district court's reduction of sentence under Guidelines § 5K1.1, which applies to a defendant's substantial assistance before sentencing. Because the "only practical difference between Rule 35(b) and [Guidelines] § 5K1.1 is a matter of timing," the court saw "no reason why Rule 35(b) motions should be governed by a different standard." Pet. App. A3-A4 (internal quotation marks omitted). Because "[petitioner's] appeal [did] not fall within the limited jurisdiction conferred by § 3742," the court "dismiss[ed] the appeal for want of jurisdiction." *Id.* at A4.

ARGUMENT

Petitioner contends (Pet. 8-11) the court of appeals erred in holding that 18 U.S.C. 3742, rather than 28 U.S.C. 1291, governs the appeal of a district court's ruling on a motion for reduction of sentence pursuant to Rule 35(b).[3]

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[3] In pertinent part, 18 U.S.C. 3742 provides:

> (a) Appeal by a defendant.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence —
>
> (1) was imposed in violation of law;
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines; or
>
> (3) is greater than the sentence specified in the applicable guideline range to the extent that the sen-

Contrary to petitioner's contention, the court of appeals' decision, which is consistent with decisions of the Fourth, Ninth, and Eleventh Circuits, is correct. See *United States* v. *Pridgen*, 64 F.3d 147, 148-150 (4th Cir. 1994); *United States* v. *Arishi*, 54 F.3d 596, 597-599 (9th Cir. 1995); *United States* v. *Chavarria-Herrara*, 15 F.3d 1033, 1035-1036 (11th Cir. 1994); see also *United States* v. *Manella*, 86 F.3d 201, 202-203 (11th Cir. 1996). As those courts have explained, a defendant's appeal of a district court's ruling on a motion by the government to reduce his sentence under Rule 35(b) involves an appeal of "an otherwise final sentence" within the meaning of 18 U.S.C. 3742(a). *United States* v. *Pridgen*, 64 F.3d at 149; *United States* v. *Arishi*, 54 F.3d at 598; *United States* v. *Chavarria-Herrara*, 15 F.3d at 1035-1036. Moreover, Rule 35 was substantially amended by Congress when Section 3742 was enacted as part of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, §§ 213(a), 215(b), 98 Stat. 2011, 2015. At that time, Congress clearly indicated that appeals from rulings

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tence includes a greater fine or terms of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

In pertinent part, 28 U.S.C. 1291 provides:

The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *, except where a direct review may be had in the Supreme Court.

on Rule 35 motions should be governed by Section 3742. See S. Rep. No. 225, 98th Cong., 2d Sess. 158 (1983) (Rule 35 was amended "in order to accord with the provisions of proposed section 3742 of title 18 concerning appellate review of sentences"); see also *United States* v. *Pridgen*, 64 F.3d at 149; *United States* v. *Arishi*, 54 F.3d at 598-599; *United States* v. *Chavarria-Herrara*, 15 F.3d at 1036 & n.5. And, as the court of appeals explained in this case, it is clear that Section 3742 governs an appeal from a sentence when a defendant claims that a district court should have reduced his sentence (or should have reduced it further) under Sentencing Guidelines § 5K1.1 based on a defendant's substantial assistance to the government before sentencing. Because the "only practical difference between Rule 35(b) and [Guidelines] § 5K1.1 is a matter of timing," the court correctly concluded that there is "no reason why Rule 35(b) motions should be governed by a different standard." Pet. App. A3-A4 (internal quotation marks omitted); see also *United States* v. *Pridgen*, 64 F.3d at 149.

As petitioner points out (Pet. 8-11), the First Circuit reached a contrary conclusion in *United States* v. *McAndrews*, 12 F.3d 273, 276-279 (1st Cir. 1993), in holding that it had jurisdiction under 28 U.S.C. 1291 "to hear a timely appeal in which a prevailing defendant complains that the district court acted too grudgingly in dispensing relief under Rule 35(b)." 12 F.3d 279. The First Circuit reasoned that "the appealability of an order resolving a Rule 35(b) motion is not controlled by 18 U.S.C. § 3742 because such an order is not, properly speaking, a sentence." *Id.* at 277 (footnote omitted). It also noted that "an order resolving a Rule 35(b) motion satisfies the preconditions established by section 1291, for entry of

the order leaves nothing further to be done." *Ibid.* The First Circuit concluded that "[a]n order granting or denying a Rule 35(b) motion is, thus, a final decision for purposes of section 1291." *Ibid.*[4]

Although there is a conflict between the First Circuit and the other courts of appeals over the question presented in this case, further review by this Court is unwarranted at this time. Because the First Circuit was the first court of appeals to decide the question in *McAndrews*, the court did not have the benefit of the analysis employed by the other courts of appeals in resolving the issue. The First Circuit in *McAndrews*, for example, did not consider the legislative history concerning the interrelationship of the amendment to Rule 35(b) and the enactment of 18 U.S.C. 3742, as did the Fourth and Eleventh Circuits in their subsequent decisions. Since deciding *McAndrews*, the First Circuit has not had occasion to reconsider the question. See *United States* v. *Angiulo*, 57 F.3d 38, 40-41 (1st Cir. 1995) (noting that denial of Rule 35(b) motion was appealable under *McAndrews* but finding that defendant did not file timely notice of appeal). Because the First Circuit may be willing in a future case to reexamine its decision in *McAndrews*

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[4] In *United States* v. *Lee*, 46 F.3d 674, 677 (7th Cir. 1995), the Seventh Circuit cited the First Circuit's decision in *McAndrews* for the general proposition that a district court's order refusing to grant relief under Rule 35(b) is appealable. The Seventh Circuit did not specifically address the question presented in this case of whether an appeal is available under 28 U.S.C. 1291. Nor is it clear that the outcome of that case—reversal because of the district court's failure to consider the basis for the Rule 35(b) motion (see 46 F.3d at 681)—was affected by the theory under which the court of appeals had jurisdiction.

in light of the contrary decisions of other courts of appeals, this Court's intervention to resolve the conflict would be premature.

In addition, further review is unwarranted because petitioner is not entitled to relief under any standard of review. Cf. *McAndrews*, 12 F.3d at 278 n.9, 279-280 (noting that the district court has discretion in extent of sentence reduction under Rule 35(b) and reviewing district court's failure to grant a hearing on Rule 35(b) motion under an abuse of discretion standard). Petitioner contends (Pet. 11-16) that the district court's failure to reduce his sentence further was improper for three reasons. First, petitioner asserts (Pet. 11-13) that the court violated an agreement between the parties to take into account cooperation provided by the third-party intermediary. The record squarely refutes that assertion. Although the court expressed its displeasure at the government's use of third-party intermediaries, the court repeatedly made clear that it had taken into account the cooperation of the third-party intermediary as a basis for reduction of petitioner's sentence.[5] C.A. App. 76, 81-82, 84.

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[5] Contrary to petitioner's suggestions (Pet. 3, 12), there was no written "cooperation agreement" between the government and petitioner requiring that petitioner be given credit for the cooperation of any third-party intermediary. Rather, the government orally agreed to file a Rule 35(b) motion if petitioner provided substantial assistance. Gov't C.A. Br. 17. In any event, petitioner has never claimed—nor could he—that the government did not bring to the court's attention the full extent of his direct cooperation as well as the cooperation of his third-party intermediary when it moved to reduce his sentence.

Second, petitioner claims (Pet. 13-14) that the district court made a mistake of fact about his participation in the offense when it stated that he "ran the New York operation" for the organization. The context of that remark, however, reflects that the court fully appreciated petitioner's role in the New York organization. After stating that petitioner "ran the New York operation," the court continued: "Now, you did it under the leadership of other people more significant than yourself, but you didn't just run an errand on one occasion for these people. You were involved day in, day out, at the top level of a major drug organization." Govt. C.A. Br. 14; C.A. App. 83. Neither petitioner nor his counsel objected to that characterization of petitioner's role. In any event, it is clear from those comments that the court was not under the misimpression, as petitioner suggests, that petitioner was the leader of the entire New York cell.

Finally, petitioner contends (Pet. 14-16) that his reduced sentence of 11 years' imprisonment is "disproportionately harsh" in comparison to the sentence of co-defendant Roe, whose term of imprisonment was reduced from 27 years to 15 years. That contention has no merit. A sentencing court is not required to equalize the treatment of co-defendants. In any event, petitioner's claim is inaccurate. Following the retroactive amendment to the Sentencing Guidelines, the sentencing range for both petitioner and Roe was 235-292 months' imprisonment. The difference between Roe's minimum guideline range sentence and the reduced sentence of 15 years he received based on his cooperation was four years and seven months. In comparison, the difference between petitioner's original 16-year sentence—which was below the minimum guideline range sentence even after application of the

retroactive amendment—and his reduced sentence of 11 years was five years. Petitioner therefore has no basis for claiming that his sentence reduction was disproportionately low in comparison to the reduction received by Roe. Accordingly, petitioner's claims merit no further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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